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**November 23, 2004**

**VIA OVERNIGHT MAIL**

**Chief Justice Ronald George**
**and the Associate Justices of the**
**California Supreme Court**
**350 McAllister Street**
**San Francisco, CA 94102**

**Re:** ***In re Anderson Hawthorne*, Case No. S 116670**

**Dear Chief Justice:**

On November 15, 2004, Respondent's counsel, the California Attorney General, filed his letter in reply to the four amicus briefs filed in support of Petitioner Anderson Hawthorne, Jr. ("Respondent's Reply Letter"). Respondent's Reply Letter raises a number of new points not raised by Respondent in any previous pleading. Respondent's Reply Letter also contains a number of incorrect or misleading statements. Through this letter, Petitioner cites additional authorities that demonstrate the inaccuracy of various arguments and statements made in Respondent's Reply Letter.

**Through Respondent's Reply Letter, Respondent's counsel urges this Court to follow the lead of some other state courts and legislatures that he claims have adopted a strict 70 I.Q. cutoff.[1] (Respondent's Reply Letter at 4-5.) However, Respondent has not explained how this could be done, consistent with the legislative intent in enacting Penal Code § 1376.[2] Instead, Respondent argues that the adoption of a strict 70 I.Q. cutoff is necessary to save the constitutionality of Penal Code § 1376 from a challenge that it is otherwise void for vagueness. Respondent's Reply Letter at 2-3.**

[1]As discussed below, Respondent's summary of these law is fundamentally misleading.

[2]This failure is unsurprising, since Respondent's counsel bargained away a presumptive I.Q. cutoff of 70 for other procedural advantages in the course of the adoption of that statute. Traverse at 3-5.

**Respondent's implied argument, that without a strict IQ cutoff Penal Code § 1376 would be unconstitutionally vague, is devoid of merit. In *Money v. Krall* (1982) 128 Cal.App.3d 378, the California Court of Appeal upheld the forced institutionalization of Keith Krall under Penal Code § 6500, which permits the civil commitment of mentally retarded individuals who are a danger to themselves and others. Krall objected to the trial court's finding that he was mentally retarded beyond a reasonable doubt, based in part on I.Q. scores that ranged from 67 to 83. (*Money*, 128 Cal.App.3d at 399.) Krall also contended that the term mental retardation was void for vagueness. The court rejected both of these objections.[3] While admitting that the multi-factor approach to scientific diagnosis of mental retardation involves**

> **points of unavoidable uncertainty . . . . If we have learned anything about mental retardation in the last decades, it is that hidden beneath that simple and single diagnostic label lies a complex range of behavioral phenomena stemming from a variety of causes. The lack of precision is not created by the code section, and does not make the statute unconstitutional**

**(*Id.* at 398-99 (citations omitted).) The court further noted that "[t]he term 'mental retardation' has a demonstrably established technical meaning which basic definition remains well recognized; the term is not unconstitutionally vague." (*Id.* at 399.) In the context of mental health issues, courts face the constant task of evaluating concepts that lack precise numerical computation, yet this alone is an insufficient basis to invalidate statutes defining competency or insanity on vagueness grounds. (*See*, *e.g.*, *Parrish v. Colorado* (10th Cir. 1996) 78 F.3d 1473 (upholding against vagueness challenge statute prohibiting release of defendant adjudged insane if he suffered from an "abnormal mental condition which would be likely to cause him to be dangerous either to himself or to others or to the community in the reasonably foreseeable future"); *Jones v. Penny* (M.D.N.C.1974) 387 F.Supp. 383 (upholding against a vagueness challenge law that restricted motor vehicle licenses to individuals who are "mentally competent to operate a motor vehicle with safety to persons and property").)**

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[3] In rejecting Krall's argument that various I.Q. scores above 70 disqualified him from mental retardation, the court cited the Diagnostic and Statistical Manual on Mental Disorders, Third Edition ("DSM-III") for the following proposition:

> "Since any measurement is fallible, an IQ of 70 is considered to represent a band or zone of 65 to 75. *Treating the IQ with some flexibility permits the inclusion in the Mental Retardation category of individuals with IQs somewhat higher than 70 who truly need special education or other programs. It also permits the exclusion from the diagnosis of individuals with IQs somewhat lower than 70 if the clinical judgment is that there is no significant deficits or impairment in adaptive functioning.*"

(128 Cal. App.3d at 400 (emphasis in original) quoting DSM-III at 36-37.)

**Moreover, Respondent's counsel has offered no reason why a definition of mental retardation that has not proved problematic for trial courts in other contexts will somehow become unmanageable in this one. (*See* Penal Code § 1002.20 (governing diversion for mentally retarded defendants); Amicus Letter of Protection and Advocacy, Incorporated at 8-12.) The California Legislature clearly did not believe this would be the case, since they consciously chose**
**the same definition used in other laws, and Respondent's counsel has offered no reason for this Court to mistrust the Legislature's judgment on this point.**

**Respondent next sets forth a highly inaccurate summary of the laws of other states, which Respondent urges this Court to copy in disregard of the language and legislative history of Penal Code § 1376. To support this argument, Respondent suggests that a number of states have adopted strict numerical IQ cutoffs of 70, when in fact, they have not. Respondent's Reply Letter at 4.[4] For example, Respondent has listed Arizona as a state that establishes an IQ cutoff of 70, although both the Arizona Legislature and the Arizona Supreme Court have recognized that "[t]he court in determining the intelligence quotient shall take into account the margin of error for the test administered." (Arizona Revised Statutes § 13-703.02.K.4. *See also State v. Dann* (Ariz. 2003) 79 P.3d 58 (defendant's IQ tests were above "the 'seventy to seventy-five' range specified by the Supreme Court in *Atkins* as triggering the mental retardation inquiry"); *State v. Canez* (Ariz. 2003) 74 P.3d 932, 937 (recognizing that "[a]n IQ below 70-75 indicates sub-average intellectual functioning"); *State v. Grell* (Ariz. 2003) 66 P.3d 1234, 1238 (same); Arizona Revised Statutes § 13-703.2(c) ("If the prescreening psychological expert determines that the defendant's intelligence quotient is higher than *seventy-five*, the notice of intent to seek the death penalty shall not be dismissed...").)**

**In addition, the courts of many states that Respondent insists have established an IQ cutoff of 70 have in fact endorsed the AAMR and DSM criteria, and have recognized that the actual IQ threshold is a range that reaches to at least 75.[5] (***See*, *e.g.*, *Williams v. State* (Ind. 2003) 793 N.E.2d 1019, 1028 (quoting *Atkins* for the proposition that "[a]n IQ between 70 and 75 or lower, ... is typically considered the cutoff IQ score for the intellectual function prong

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[4]In his summary of state laws, Respondent counsel also neglects to mention that the State of Illinois has enacted a statute which provides that "An intelligence quotient (IQ) of *75 or below* is presumptive evidence of mental retardation." (725 Illinois Compiled Statutes Annotated § 5/114-15(d) (emphasis added).)

[5]These decisions are not surprising, since a number of states have adopted rebuttable presumptions regarding IQ scores that logically allow evidentiary hearings, even in some cases when individuals have IQ scores above the presumptive range. (*See, e.g*, Arkansas Code Annotated § 5-4-618(a)(2) ("There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below."); **Nebraska. Revised Statutes § 28-105.01(3) ("An intelligence quotient of seventy or below . . . shall be presumptive evidence of mental retardation"); New Mexico Statutes Annotated § 31-20A-2.1(A) (same).) Of course a rebuttable** presumption – of the sort Respondent's counsel unsuccessfully proposed as part of SB 51 – is very different from the sort of strict numerical IQ cutoff that Respondent's counsel now proposes.

of the mental retardation definition"); *Chase v. State* (Miss. 2004) 873 So.2d 1013, 1021 (because the DSM IV-TR allows diagnosis of mental retardation in individuals with an "IQ range between 71 and 75 . . . . [defendant's] Full Scale IQ of 71 . . . is within the range which can indicate mental
retardation"); *Doss v. State* (Miss. 2004) 882 So.2d 176, 190 (Petitioner who submitted evidence of full scale I.Q. of 71 has more than met the threshold requirement for trial court hearing because he has "a combined Intelligence Quotient ('IQ') score of 75 or below"); *State v. Lott* (Ohio 2002) 779 N.E.2d 1011, 1014 (remanding habeas petitioner's claim for hearing before the trial court, because whether petitioner "is mentally retarded is a disputed factual issue," when lowest IQ score is 72, and other tests yielded results of 77-81, 83-91, and 87-97)[6]**;** ***Commonwealth v. Miller*** **(Pa.Com.Pl. 2003) 2003 WL 23278215, at * 67, *78 ("the ceiling for IQ criterion may go up to 75," thus "[w]hile petitioner's IQ scores varied widely, the evidence provided this court established by a preponderance of the evidence that his IQ qualifies as between 70 and 75, or below, placing him in the mild mental retardation range").)**[7]

**Moreover, these decisions are consistent with others in states that Respondent acknowledges have not adopted a set IQ cutoff by statute or decisional law. (*See*, *e.g.*, *State v. Dunn* (La. 2002) 831 So.2d 862, 886 n. 9 (under the 2002 AAMR Guidelines, the standard error of measurement must be taken into account in evaluating any IQ test score); *State v. Harris* (N.J. 2004) 859 A.2d 364, 446 (under the AAMR guidelines "[i]f the IQ score is valid, significant subaverage intellectual functioning 'will generally result in a score of approximately 70 to 75 or below . . . This upper boundary of** IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner").)[8]

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[6]Remarkably, Respondent cites *Williams* and *Lott*, *supra*, for the proposition that Ohio and Indiana have adopted strict 70 I.Q. cutoffs (Respondent's Reply Letter at 4), when those two cases *contradict* this assertion.

[7]As this summary of state decisions shows, the *Atkins* decision has been influential in convincing states to recognize that individuals with I.Q.s between 70 and 75 can be mentally retarded. In *Atkins v. Virginia* (2002) 536 U.S. 304, the majority quoted the AAMR and DSM definitions of mental retardation (*id*. at 309 n. 3) and noted:

> It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.

(*Id.* at 309 n. 5 *citing* 2 B. SADOCK & V. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (7TH ED. 2000).)

[8]Respondent's counsel also cites to three other states that he contends have adopted requirements for exemption from execution that require more than mental retardation alone. (Respondent's Reply Letter at 4.) Close examination of a recent court decision from one of these states, Oklahoma, shows that it has begun utilizing standards that are in reality no different from the others summarized above. (*Ochoa v. State* (Okla. Crim. App., April 15, 2004) PCD 2002-1286, Slip op. at 2-5 (because mental retardation can be diagnosed in individuals with I.Q. scores between 70 and 75 who exhibit significant adaptive deficits, petitioner with IQ scores of 72, 75 and 86 is entitled to an evidentiary hearing on his mental retardation claim).)

Respondent's counsel also repeats an argument he first made in the Informal Response, that *Atkins* does not extend to all mentally retarded offenders, but only to a subset about whom Respondent contends there is a national consensus. (Respondent's Reply Letter at 2-3.) As noted in the Informal Reply filed in this Court on August 11, 2003, at pages 3-6, the *Atkins* decision itself contradicts this argument. In *Chase v. State*, *supra*, the Mississippi Supreme Court rejected an identical argument, concluding that "*Atkins* exempts *all* mentally retarded persons – even those who are minimally mentally retarded – from execution." (873 So.2d at 1026 (emphasis in original).)

Respondent's counsel also recites a long list of activities that he alleges Petitioner can perform and then argues, without any legal or scientific support, that this somehow proves that Petitioner is not mentally retarded. (Respondent's Reply Letter at 7-8.) This list includes some baffling entries, including the fact that Petitioner could swim, that he consumed alcohol and drugs, and that he often would mumble and had to be told to speak up. (*Id*.) As the American Association on Mental Retardation noted in their amicus brief, mental retardation is a scientific concept requiring expert testimony. (AAMR Amicus Brief at 15 n. 15.) For this reason:

> "Grave mistakes could be made if appellate courts base determinations about mental retardation on intuitive feelings about mental retardation or the ways in which people with mental retardation should act."

(*Id*. at 16, n.15 *quoting* Davis, *Intelligence Testing and Atkins: Considerations for Appellate Courts and Appellate Lawyers* (2003) 5. J. APPELLATE PRACTICE & PROCESS 297, 307.)

Finally, Respondent argues that Petitioner must present medical evidence establishing that he was diagnosed as mentally retarded before age eighteen. (Respondent's Reply Letter at 12.) Respondent cites no authorities that supports this proposition. As the AAMR noted in its amicus brief, this argument is not scientifically sound. (AAMR Amicus Brief at 14-15.) Moreover, the Oklahoma Court of Criminal Appeals rejected an identical argument in *Murphy v. State* (Okla. Crim. App. 2002) 54 P.3d 556:

> "Manifestation before the age of eighteen" is a fact question intended to establish that the first signs of mental retardation appeared and were recognized before the defendant turned eighteen. Lay opinion and poor school records may be considered. Thus a defendant need not, necessarily, introduce an intelligence quotient test administered before the age of eighteen or a medical opinion given before the age of eighteen in order to prove his or her mental retardation manifested before the age of eighteen, although such proof would surely be the more credible of that fact.

(*Id*. at 567 n.19.)

**Very truly yours,**

**Harry Simon**
**Deputy Federal Public Defender**

**PROOF OF SERVICE**

**I, the undersigned, declare that: I am employed in Los Angeles County, California; my business address is the Federal Public Defender's Office, 321 East Second Street, Los Angeles, California 90012-4202; I am over the age of eighteen years; I am not a party to the action entitled below; I am employed by the Federal Public Defender for the Central District of California, who is a member of the bar of the United States District Court for the Central District of California, and at whose direction I served a copy of the attached LETTER DATED NOVEMBER 23, 2004 TO THE CALIFORNIA SUPREME COURT on the following individual(s), addressed as follows, by:**

| [ ] Placing same in a sealed envelope for collection and interoffice delivery: | [ ] Placing same in an envelope for hand-delivery: | [X] Placing same in a sealed envelope for collection and mailing via the United States Post Office: | [ ] Faxing same via facsimile machine: |
|---|---|---|---|

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**Anderson Hawthorne, Jr.**
**CDC# D-24801**
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**I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.**

**This proof of service is executed at Los Angeles, California, on November 23, 2004.**

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**Gina Enriquez**